

THE STATE OF NEW HAMPSHIRE  
DEPARTMENT OF ENVIRONMENTAL SERVICES  
WASTE MANAGEMENT COUNCIL

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JUL 01 2003

DOCKET #03-05 WMC

IN RE: NORTH COUNTRY ENVIRONMENTAL SERVICES, INC.

Standard Permit No. DES-SW-SP-03-002

BETHLEHEM'S MOTION FOR REHEARING

The Town of Bethlehem, (the "Town") by and through its counsel, Boutin & Associates, P.L.L.C., files this Motion for Rehearing, pursuant to ENV-WMC 203.29, in the above-entitled Appeal to the Waste Management Council ("WMC") on its ruling on North County Environmental Service's ("NCES") Motion to Dismiss, and in support thereof states:

1. On April 14, 2003, the Town filed a Notice of Appeal of the issuance of Standard Permit No. DES-SW-SP-03-002 to NCES by the New Hampshire Department of Environmental Services ("NHDES").
2. On or about May 7, 2003, NCES filed a Motion to Dismiss Appeal.
3. The Town filed an Objection to the Motion to Dismiss on May 16, 2003, and the WMC held a hearing on the motion, and several other pending motions on May 22, 2003.
4. The WMC voted to dismiss the Appeal, (4 yes, 3 no, and with one abstention).

Basis for Motion for Rehearing

5. The Town believes its Appeal raised significant issues that the WMC should have decided prior to an appeal to the New Hampshire Supreme Court.

6. As the WMC member who abstained, Nancy Kinner, indicated, she had questions about factual issues, but was not prepared to vote either way so she abstained from voting. See Tape 2 of Docket No. 03-05 WMC.

7. There are genuine issues of fact in this case that must first be decided by the WMC, prior to appeal to the New Hampshire Supreme Court.

8. The Town should have the opportunity to examine NHDES officials and witnesses to ascertain the NHDES's applied definition to RSA 149-M, especially the specific considerations under RSA 149-M:11(IV)(a). The practical definitions applied by those NHDES officials cannot be ascertained by the pleadings.

9. The Town should also have the opportunity to examine witnesses as to the Town's claim that their copy of the application was incomplete at the time of the Public Hearing. This is a factual determination that cannot be ascertained by a review of the pleadings. It is error to simply accept NCES's assertion that the Town must have received the copy, when Town officials and citizens are prepared to testify otherwise.

10. The Town should also have the opportunity to examine witnesses as to the Town's claim that NHDES's determination that the application meets a short-and long-term capacity shortfall under RSA 149-M:11(III)(a) is erroneous and that NHDES erred in issuing the permit because the facility does not assist the state in achieving the implementation of the hierarchy and goals under RSA 149-M:2 and M:3, as required under RSA 149-M:11(III)(b).

11. All of the facts are not in evidence, and the Town respectfully believes that a rehearing must be granted to allow the Town to call witnesses, and cross-examine witnesses pursuant to Env-WMC 203.19.

12. This Motion for Rehearing should be granted so that additional evidence may be permitted to cure deficiencies in testimony, as the appeal was dismissed without a hearing under ENV-WMC §§203.18-203.20.

13. Although one might infer from the WMC's dismissal order that the WMC interprets RSA 149-M:11(IV) and (IV)(a) as not requiring anything more than a review of the Town's citizens and governing bodies—without actually considering or giving any weight to those concerns. The Town believes, however, that the WMC's written decision is far from clear on the issue raised by the Town as to weight of the consideration given by DES to those concerns expressed by the Town's citizens and governing body. See Order, p. 3 (where the WMC indicates that DES complied with RSA 149-M:11(IV)(a) because it held a public hearing, but does not address in its Order what weight should be given to the word “considered” as used in RSA 149-M:11(IV)).

14. The procedural setting in an appeal of a DES decision to the WMC, like appeals of NHDES decisions to the Supreme Court, the WMC sits as the trier of fact and evaluates the competing evidence. See Appeal of Town of Newington, 821 A.2d 1100, 1104 (N.H. April 21, 2003) (cites omitted). The Supreme Court recently sent the Newington case back to the NHDES so that NHDES could make sufficient findings of fact to support its decision. Id. at 1105.

15. If the Supreme Court “cannot meaningfully review an agency’s determination when it provides no illumination of its conclusion” the Supreme Court reverses and sends the case back to the agency to make those additional findings of fact. Id. (citing Appeal of Mikell, 145 N.H. 435, 442 (2000)).

16. Without a hearing, the Town believes that the record below is inadequate for

meaningful review by the New Hampshire Supreme Court.

17. Without a Hearing the Town believes it was denied its rights of appeal under RSA 149-M:8, RSA 21-O:9, RSA 21-O:14, RSA 541, and Env-WMC 203.

WHEREFORE, The Town of Bethlehem requests the following relief:

- A. Grant the Town's Motion for Rehearing;
- B. Schedule a Hearing where the Town can call and cross-examine witnesses, and present evidence on all matters raised in its Notice of Appeal;
- C. Allow the Town and NCES to file Findings and Rulings pursuant to 203.23; and
- D. For other relief that may be just.

Respectfully submitted,

**TOWN OF BETHLEHEM**

By Its Attorneys,

BOUTIN & ASSOCIATES, P.L.L.C.

Date: July 1, 2003

By,




Brenda E. Keith  
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(603) 432-9566

**CERTIFICATE OF SERVICE**

I, Brenda E. Keith, Esquire, hereby certify that I made service of the foregoing Motion to Continue Appeal by hand-delivering a copy of the same to: Michael Nolin, Commissioner New Hampshire Department of Environmental Services, Dr. Philip O'Brien, Director of Waste Management Division, Town of Bethlehem, Mark R. Harbaugh, DES Legal Unit, Michael Guilfooy, DES-WMD, Richard Reed, DES-WMD, and, via e-mail/fax and U.S. Post to: Bryan K. Gould, Esquire, counsel for North Country Environmental Services, and Maureen D. Smith, Attorney General's Office.

Date: July 1, 2003

**COPY**

  
Brenda E. Keith